(2)

No. 99-1196

IN THE

Supreme Court of the United States

TRANSAMERICA ASSURANCE COMPANY, *et al.*,

Petitioners,

v.

EARL TILLERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS DEE FRASIER
FRASIER, FRASIER & HICKMAN, LLP
Attorneys for Respondents
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101-0799
(918) 584-4724

158352

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

STATEMENT OF THE CASE

Respondents brought this case in state court against Petitioners for fraud in inducing Respondents to purchase insurance under a policy issued by Petitioners. Petitioners removed the action to federal court, claiming that federal jurisdiction existed because of diversity of citizenship/ amount in controversy and because this was an ERISA claim. Respondents moved to remand, arguing that there was not diversity of citizenship, the requisite amount in controversy had not been met, and that this was not a claim under ERISA. The ruling in favor of Respondents on the diversity of citizenship/amount in controversy jurisdictional issue is not contested here. Rather, Petitioners contest the lack of federal jurisdiction under ERISA.

In the courts below, Respondents maintained two positions relative to whether this action was governed by ERISA or not. First, Respondents contended that the insurance policy herein was not governed by ERISA. *See Zavora v. Paul Revere Life Insurance Company*, 145 F.3d 1118 (9th Cir. 1998), holding that insurance is outside the purview of ERISA where the employer makes no contributions, participation by employees is voluntary, the sole function of the employer is to collect and remit premiums, and the employer is not paid for sponsoring the program. All of these conditions were met in this case. Further, the insurance herein is even farther removed from ERISA because, although the union had some dealings with Petitioners to set up the insurance, it was not in any way a matter of collective bargaining with the company, as in the case of union-sponsored retirement or health plans where the collective bargaining agreements require the company to pay all or part of the costs for employees.

Second, even if the insurance were subject to ERISA, the claims brought herein are not brought under ERISA. The relevant cases here are *Woodworker's Supply, Inc. v. Principal Mutual Life Insurance*, 170 F.3d 985 (10th Cir. 1999), which holds that fraud in the inducement claims are not subject to ERISA, and *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332 (5th Cir. 1999), which distinguishes between claims that are completely preempted, giving federal court jurisdiction, and claims which are conflict-preempted, which does not give rise to federal jurisdiction. Complete preemption applies only where the claim is brought under ERISA; where the claim is of a type not within the purview of ERISA, only conflict preemption can apply.

The district court granted the motion to remand on the grounds that plaintiffs have some control over what they are suing for and that the claim herein is not brought under ERISA. *See* Petition for a Writ of Certiorari, Appendix B, p. 10a. The district court ruled that this action is not an ERISA claim and jurisdiction does not exist in the federal court.

The Tenth Circuit, on appeal, considered well-established law to the effect that orders of remand are generally not appealable, unless the order of remand was not made in good faith. 28 U.S.C. § 1447(d). The Tenth Circuit considered that the order of remand was in good faith and that it, therefore, lacked jurisdiction over the appeals.

REASONS FOR DENYING THE WRIT

THE TENTH CIRCUIT OPINION IS WELL-GROUNDED IN LAW

28 U.S.C.§ 1447(d) states in pertinent part:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to § 1443 of this title [dealing with civil rights cases] shall be reviewable by appeal or otherwise.

This seems fairly clear. The district court has remanded the case to state court; the Court of Appeals found no evidence that that order was made in bad faith; the Tenth Circuit properly ruled that it lacked jurisdiction in this matter.

There are two problems with Petitioners' arguments about wanting to amend their Notice of Removal. First, their request for amendment came after the district court said at oral argument that it had no jurisdiction. In other words, it came too late. Second, the district court considered that plaintiffs have some control over what it is they are suing for and that Respondents said they were suing for something outside the scope of ERISA. Thus, even though Respondents' claims could ultimately be conflict-preempted by ERISA, the claims themselves were outside the scope of ERISA and, therefore, not preempted so as to grant federal court jurisdiction. No amendment of the removal notice would cure such a defect.

Federal courts are of limited jurisdiction. If there is some doubt as to whether they have jurisdiction, the appropriate thing is to remand the case to state court. The lower courts have acted properly here. The district court decision is not subject to review.

CONCLUSION

WHEREFORE, Respondents request this Court to deny *certiorari* and allow this matter to proceed forward in state court.

Respectfully submitted,

THOMAS DEE FRASIER
FRASIER, FRASIER & HICKMAN, LLP
Attorneys for Respondents
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101-0799
(918) 584-4724